



In the Matter of:

**RICKY POLGAR,**

**ARB CASE NO. 97-056**

**COMPLAINANT,**

**ALJ CASE NO. 94-STA-46**

**v.**

**DATE: March 31, 1997**

**FLORIDA STAGE LINES,**

**RESPONDENT.**

BEFORE: THE ADMINISTRATIVE REVIEW BOARD<sup>1/</sup>

**ORDER GRANTING BACK PAY  
AND ATTORNEY'S FEES**

By motion dated November 21, 1996, Complainant has petitioned this Board for an award of additional back pay (based on the formula previously outlined in the Secretary's Order of June 5, 1995) and appellate attorney's fees. By order dated February 10, 1997, the Board provided Respondent with an opportunity to respond to Complainant's motion. Respondent on February 20, 1997 submitted a reply to that order which, as outlined below, moved for a "reduction in awards" to Complainant. In December, 1996, the Secretary's Final Decision and Order (F. D. and O.) was affirmed by the Eleventh Circuit Court of Appeals. On or around the 28th of February, 1997, Complainant responded to the Respondent's submissions by filing a pleading captioned "Complainant's Motion to Strike Respondent's Reply to ARB Order", supported by an attached affidavit from the Complainant. While the Board has reviewed and considered the arguments made in all of the pleadings, we are also mindful of the cautionary note that the United States Supreme Court has made in matters such as this, ". . . a request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. at 437 (1983). *See also, Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1201 (10th Cir. 1986).

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<sup>1/</sup> On April 17, 1996, a Secretary's Order was signed delegating jurisdiction to issue final agency decisions under this statute to the newly created Administrative Review Board. 61 Fed. Reg. 19978 (May 3, 1996). Secretary's Order 2-96 contains a comprehensive list of the statutes, executive order, and regulations under which the Administrative Review Board now issues final agency decisions. Final procedural revisions to the regulations implementing this reorganization were also promulgated on that date. 61 Fed. Reg. 19982.

Complainant's motion seeks recovery of his lost back pay which, including \$500.00 in interest, is calculated to be \$15,967.86 (as of the date of the motion) and covers the period from his unlawful discharge on May 19, 1994, until his eventual reinstatement on October 1, 1995. In addition, Complainant's counsel seeks an award of attorney's fees in the amount of \$10,642.50 (subsequently lowered, as explained below). The latter is calculated at the rate of \$165.00 an hour and covers the 63.7 hours<sup>2/</sup> which counsel spent representing Complainant in defense of the Secretary's final decision in this matter before the U.S. Court of Appeals for the Eleventh Circuit. Complainant's motion included two pieces of supporting documentation -- a "Back Pay Affidavit" showing Complainant's [interim] earnings since May 20, 1994 and a listing of Complainant's attorney's time and billing records in this matter. This information was further supplemented by an Affidavit In Support of Motion for Appellate Attorney's Fees submitted to the Board by Attorney Julius Williams on February 10, 1997.

Under the Surface Transportation Assistant Act, Complainant Polgar, as a successful litigant, is entitled to an order requiring Respondent to take affirmative action to abate the violation, reinstate him to his former position with the same pay, terms and privileges of employment, and compensatory damages, including back pay. 49 U.S.C. § 31105(b)(3)(A). *See*, Secretary's Final Decision and Order of June 5, 1995. The Board may also assess against Respondents the costs, including attorney's fees, reasonably incurred in bringing the complaint. 49 U.S.C. § 31105(b)(3)(B).

Turning to the substantive issues still before the Board, Respondent's February 20, 1997 reply (RR) to the Board's briefing order of February 10, 1997 contains three central arguments:

1) That the assessment of an "interest penalty" is not applicable in this case because, "[there] was never an order issued granting interest." RR at 1. Moreover, Respondent argues that the \$500.00 claimed in interest is a "guesstimate contrived by Complainant's attorney and is not supported by fact."

2) That the back pay award claimed (\$15,467.86 -- without interest) is excessive in that it fails to take into consideration, *inter alia*,<sup>3/</sup> the "seasonal nature of Respondent's business and Complainant's status as a part-time employee.

3) The attorney fee award sought is excessive in that it contains an unexplained increase in the hourly fee charged by Complainant's attorney. (From \$150.00 per hour

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<sup>2/</sup> By "Notice of Errata" dated February 26, 1997, Complainant's counsel indicated that the number of hours worked on this case should be reduced by .8 of an hour. The total hours billed should therefore be 63.7.

<sup>3/</sup> We agree with Complainant that the back pay formula and/or calculations which have now been affirmed by the court of appeals should not be disturbed. *See*, Complainant's Motion to Strike (CM) at 2, ¶ 4.

charged for the administrative, *i.e.* Department of Labor, phase of the case, to a \$165.00 per hour fee charged for services rendered in connection with defending the administrative decision(s) of the Secretary before the U.S. Court of Appeals.

### **The Interest Assessment**

Respondent's assertion that there has never been an order granting interest in this matter is erroneous. The Secretary's April 18, 1995 Final Decision and Order (F.D. and O.) expressly awarded, "interest on the back pay awarded, calculated [as is customary in all environmental whistleblower cases] in accordance with 26 U.S.C. § 6621 (1988)." Slip op. at 5, citing *Dutile v. Tighe Trucking, Inc.*, Case No. 93-STA-31, Sec. Dec., Nov. 29, 1993, slip op. at 8, 9. The \$500 interest figure claimed by Complainant does appear to us to have been arrived at speculatively. As a result, the back pay awarded herein shall be supplemented, as in all other cases of this nature, by interest calculated in accordance with 26 U.S.C. § 6621 (1988). *See also*, 29 C.F.R. § 20.58 (1995).

### **Back Pay**

In accordance with numerous previous rulings by both this Board and the Secretary of Labor, back pay awards to victorious "whistleblowing" complainants are to be calculated in accordance with the make whole remedial scheme embodied in § 706 (g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* (1988). *See, Loeffler v. Frank*, 489 U.S. 549 (1988), 46 FEP Cases 1659.

As a victorious complainant, Polgar is entitled to be restored to the position he would have occupied but for the discrimination. *Hoffman v. W. Max Bossert and Boss Insulation and Roofing, Inc.*, Case No. 94-CAA-004 (ARB Case No. 96-091), Dec. of the ARB issued Jan. 22, 1997 slip op. at 2, citing *Smith v. Littenberg*, Case No. 92-ERA-52, Sec. Dec. and Ltd. Rem. Ord., Sept. 6, 1995, slip op. at 5 (an order which also upheld the longstanding principle that, "any uncertainties in calculating back pay are to be resolved in favor of the complainant). *Hoffman* at 2 and cases cited therein.

With regard to this case, the sporadic and seasonal nature of the work performed by this complainant has been fully and fairly treated in the previous administrative decisions. As noted in the Errata issued *sua sponte* in the case on April 21, 1995 (correcting the April 18, 1995 Secretarial decision) Polgar's back pay award was to be calculated on a per week basis. In addition, the Modified Final Decision and Order issued by the Secretary on June 5, 1995 (M.F.D. and O.) held that, "in order to arrive at a reasonable estimate of Polgar's weekly earnings, the seasonal nature of Respondent's business must be taken into account." Slip op. at 3. That order went on to recognize "Polgar's ultimate irregular earnings." *Id.*

As a result, we hold that the crux of Respondent's disagreement on this issue is without merit. We hold, further, that the basic formulation for the back pay award is now *res judicata* -- established as the law of this case -- and cannot fairly be disturbed at this point.

### Attorney's Fees

Complainant's counsel has previously submitted invoices totaling \$4,335.80. *See* F. D. and O. at 5, 6. All of these legal fees, as heretofore approved, were billed at the rate of \$150.00 per hour. Counsel's latest fee application(s), seek fees in the amount of \$10,510.50 for 63.7 hours of work<sup>4/</sup> performed during Respondent's appeal of the Secretary's Order(s) to the U.S. Court of Appeals.

Consistent with the longstanding practice of this Department, the "lodestar method" is employed in determining the proper award of attorney's fees under the various environmental whistleblower statutes. "This method requires multiplying the number of hours reasonably expended in pursuing the litigation by a reasonable hourly rate." *Clifford Sutherland, Scott Tenbrink, Fred Franklin and Aaron Hahn v. Spray Systems Environmental and William Rae Smith*, Case No. 95-CAA-1, Dec. of the Bd. issued July 9, 1995, slip op. at 1-2 citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983). As we recently noted in our *Hoffman* decision, *supra*, we are charged with examining the reasonableness of the billing rates charged by Complainant's attorney and the number of attorney hours expended in bringing the complaint. *Id.*, slip op. at 6, and cases cited therein. Our review of the record in this case, including the billing records and supporting materials submitted by Complainant's counsel leads to the conclusion that the fees requested are reasonable. Counsel's representation was both effective and successful in a case which has taken several years to litigate. In this regard we accept as a reasonable the \$15.00 per hour increase in his billing rate once the matter was appealed to the federal courts. Respondent's objections are, thus, **DENIED**.

Accordingly, based upon the evidence submitted and the provisions of law referenced above, Complaint's requests are determined to be reasonable and the motion of November 21, 1996, **IS GRANTED**. Back pay in the amount of \$15,967.86 with interest calculated pursuant to 26 U.S.C. § 6621 (1988) and attorney's fees in the amount of \$10,510.50 shall be awarded.

**SO ORDERED.**

**DAVID A. O'BRIEN**

Chair

**KARL J. SANDSTROM**

Member

**JOYCE D. MILLER**

Alternate Member

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<sup>4/</sup> Reduced, as noted above, by the Notice of Errata submitted in February of 1997.